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No. 80-544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FIRST NATIONAL MAINTENANCE CORPORATION,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR FIRST NATIONAL MAINTENANCE CORPORATION

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INTRODUCTION

This reply brief is respectfully submitted on behalf of the Petitioner, First National Maintenance Corp., in opposition to the briefs submitted on behalf of the National Labor Relations Board and amici curiae, AFL-CIO and United Auto Workers.

ARGUMENT

I.

THIS COURT'S DECISION ANNOUNCED IN *RAILROAD TELEGRAPHERS* DOES NOT SUGGEST THAT AN EMPLOYER'S DECISION TO TERMINATE A LOSING PORTION OF ITS OPERATIONS IS A MANDATORY SUBJECT OF COLLECTIVE BARGAINING

The National Labor Relations Board[1] and its amici AFL-CIO and UAW[2] have distortedly suggested that the Court's decision in *Order of Railroad Telegraphers* v. *Chicago & Northwestern Railway Co.*, 362 U.S. 330 (hereinafter "*Railroad Telegraphers*") critically impacts the resolution of the question now pending before this Court.[3] We submit that neither the sole issue nor the holding of this Court in *Railroad Telegraphers* suggests in any meaningful way that a managerial decision to terminate a losing portion of a subsisting enterprise in the absence of union animus imposes a mandatory duty to bargain with regard to such a decision.

The *Railroad Telegraphers* case arose from the railroad's filing of a complaint in federal district court in an attempt to enjoin the union's work stoppage and strike. The sole issue before the Court concerned whether the provisions of the Norris-LaGuardia Act barred an injunction in the circumstances of the case. This Court held merely that the case did in

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1 *See* Bd. Br. at 10-11, 30-32.

2 *See* AFL-CIO, UAW Br. at 3-4, 10-15, 24-25.

3 The amicus brief submitted by the AFL-CIO and UAW drastically mischaracterizes the plain import and limited holding of *Railroad Telegraphers*, representing to this Court that *Railroad Telegraphers* held that a union demand to bargain about the closing of railroad stations was a mandatory subject for bargaining under the Railroad Labor Act. *See* particularly AFL-CIO, UAW Br. at 3. This remarkable misreading of *Railroad Telegraphers* is succinctly clarified in the immediate accompanying text of Petitioner's brief, *infra*.

fact involve or grow out of a "labor dispute" within the meaning of the Norris-LaGuardia Act and that the federal district court was without jurisdiction to permanently enjoin the employees' strike.

In this Court's view, the demand by the union in *Railroad Telegraphers* for a modification of an existing collective bargaining agreement requiring the concurrence of the railroad and the union before jobs could be abolished under a contemplated plan of centralization was a "labor dispute" under section 13(c) of the Norris-LaGuardia Act. That statutory provision defines a "labor dispute" as including "any controversy concerning terms or conditions of employment". This Court held with precision that this language controlled the disposition of the case rendering the federal courts without jurisdiction to enjoin the union's strike action in support of its *request* for modification of the parties' collective bargaining agreement. 362 U.S. at 335.

Contrary to the representation made by the Respondent and amici AFL-CIO and UAW[4] that *Railroad Telegraphers* stands as controlling precedent for the proposition that an employer's partial closing decision is a mandatory subject of collective bargaining under the National Labor Relations Act, this Court's determination was restricted to the holding that the union's demand for bargaining with regard to the proposed contract modification was not an unlawful bargaining subject under the Railway Labor Act, 49 U.S.C. § 151 *et seq.* The Court observed:

> Here, far from violating the Railway Labor Act, the union's effort to negotiate its controversy with the railroad was in obedience to the Act's command that employees as well as railroads exert every reasonable effort to settle all disputes "concerning rates of pay, rules, and working conditions." 45 U.S.C. § 152. First . . . It would stretch credulity too far to say that the Railway Labor

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4 *See* note 3, *supra.*

> Act, designed to protect railroad workers, was somehow violated by the union acting precisely in accordance with that Act's purpose to obtain stability and permanence in employment for workers. 362 U.S. at 339-40.

The issue before this Honorable Court is one that the commentators have observed was reserved for future consideration when *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964) was announced several years ago. This Court in *Fibreboard* did not hold or even postulate that *Railroad Telegraphers* was a critical component in assessing whether an employer's subcontracting decision is a mandatory subject of collective bargaining. The Court made extremely limited reference to *Railroad Telegraphers* in citing the case as supportive of the proposition that the subcontracting question raised in *Fibreboard* was "well within the literal meaning of the phrase 'terms and conditions of employment.' " 379 U.S. at 210. The Court then proceeded to fully consider whether bargaining over management's subcontracting decisions would effectuate the avowed purposes of the Act, whether industrial practices in this country suggested the propriety of the subject matter for bargaining, and whether the facts of the case "illustrate(d) the propriety of submitting the dispute to collective negotiation." *Id.* at 210-213.

The Court's fleeting reference in *Fibreboard* to the limited assistance provided by its opinion in *Railroad Telegraphers* was entirely appropriate and, we would submit, of equally limited import in resolving the issue presently presented. While it has been observed that the scope of mandatory bargaining under the Railway Labor Act and the National Labor Relations Act are relevantly informational to one another and may, to some extent, converge,[5] this Court in *Railroad Telegraphers* deter-

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5 The Supreme Court observed, however, in *Chicago & North Western Railway Co.* v. *United Transportation Union,* 402 U.S. 570 n.11 (1971) that "parallels between the duty to bargain in good faith and the duty to exert every reasonable effort, like all parallels between the NLRA and Railway Labor Act, should be drawn with the utmost care and with full awareness of the differences between the statutory schemes."

mined simply that the union's demand for bargaining was *not illegal* under the Railway Labor Act:

> . . . the union merely asked for a contractual right to bargain with the railroad about any voluntary steps it might take to abandon stations or to seek permission to abandon stations and thus abolish jobs. Nothing the union requested would require the railroad to violate any valid law or the valid law of any public agency . . . the union's proposal here was not unlawful. 362 U.S. at 339.

This Court's decision can not soundly be read for the holding that management's business decisions which involve the incidental reduction of bargaining unit jobs should be raised in the negotiating arena as a mandatory subject of collective bargaining. Rather than demarcate the bargaining objective in *Railroad Telegraphers* as mandatory in nature as is mischaracterized by the Respondent and its amici, the Court ruled only that the bargaining demand was not illegal and under the Norris-LaGuardia Act, not subject to an injunctive order. The Petitioner proposes that affording *Railroad Telegraphers* its most sweeping reading for purposes of resolving the case at bar as has been urged by the Respondent, the most favorable inference which can be surmised is that the decision to undertake a partial closing is a *permissive* subject of collective bargaining under this Court's *Borg-Warner* trichotomy.[6] The Respondent's reliance on *Railroad Telegraphers* is therefore severely misplaced. *See* O'Connell, *The Implications of "Decision Bargaining"*, 16th Ann. N.Y.U. Conf. on Labor 99, 109-10 (1963); Note, *Labor Law Problems in Plant Relocation*, 77 Harv. L. Rev. 1100, 1104 (1964).[7] *See also* Goetz, *The Duty*

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6 The Court in *NLRB* v. *Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958) decisively expounded upon the distinction between lawful bargaining subjects which were divided into two groupings, including mandatory and permissive (or voluntary) subjects and illegal subjects which neither party can require be entertained in collective bargaining negotiations.

7 O'Connell writes that the "root issue" in *Railroad Telegraphers* was whether the bargaining *demand* was legitimate. "The court," he states,

to Bargain About Changes in Operations, 1964 Duke L.J. 1, 10-12 (concluding that *Railroad Telegraphers* was not "clear judicial precedent" in support of the NLRB's decision in *Town & Country Mfg. Co.,* 136 N.L.R.B. 1022 (1962)[8]); Rabin, *Limitations on Employer Independent Action,* 27 Vand. L. Rev. 133, 156-57 (viewing *Railroad Telegraphers,* in light of subsequent developments, as suggesting "fundamental distinction" between scope of bargaining over contract terms and scope of bargaining as to employer unilateral action).

The unwarrantedly expansive interpretation of *Railroad Telegraphers* urged by the Respondent need be supplanted by the carefully drawn decision and concurring opinion announced in *Fibreboard.* The implementation of this mode of analysis upon the question presented will properly result in the principled determination that an employer's partial closing decision absent union animus and predicated on legitimate business reasons comes within the "core of entrepreneurial control" and is not a mandatory subject of collective bargaining.

"held that it was, but that holding simply set the stage for bargaining over whether the clause would be agreed to by the railroads. . . . But in *Town & Country,* the Board has in effect, taken that kind of clause and *read it into* every contract in the country." O'Connell, *supra,* at 109-10. He concluded that *Telegraphers* affords "no support at all" for the *Town & Country* decision.

The Harvard commentator writes that while *Telegraphers* "may establish that job elimination is a *permissive* subject of bargaining, it does not necessarily support the Board's conclusion that it is a mandatory subject." Note, *supra,* at 1104. Pointing to the different purposes of the Norris-LaGuardia Act, the NLRA, and the RLA, he points out that Norris-LaGuardia may bar an injunction against a strike in support of a permissive subject—itself an unfair labor practice. *Id.*

8 The NLRB relied on *Railroad Telegraphers* deciding in *Town & Country* that an employer had violated Section 8(a)(3) because its subcontracting decision was tainted by union animus and breached Section 8(a)(5) even if its subcontracting decision was taken to avoid violations of ICC regulations or on account of economic concerns. The Board perceived that "the elimination of unit jobs albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8(a)(5) of the Act." 136 N.L.R.B. at 1027.

II.

THE DECISION AND PRINCIPLES ANNOUNCED BY THIS HONORABLE COURT IN *DARLINGTON* SUGGEST THAT AN EMPLOYER'S PARTIAL CLOSING DECISION IN THE ABSENCE OF UNION ANIMUS IS NOT A MANDATORY SUBJECT OF COLLECTIVE BARGAINING.

A. The Board's position is inherently inconsistent with the decision of this Court in *Darlington*.

The Chamber of Commerce of the United States has cogently argued that the imposition of a mandatory duty to bargain in the context of the partial closing of a business would be inconsistent with the holding of this Honorable Court in *Textile Workers Union* v. *Darlington Manufacturing Company,* 380 U.S. 263 (1965). In attempting to answer this argument, the Board has advanced a theory which is unsound in both law and logic.

The starting point of the Board's theory is that an employer, acting for legitimate reasons and in good faith, who is contemplating a partial closing of its business, might fruitfully engage in collective bargaining with the representative of the affected employees, with all the benefits that might inure thereto. According to the Board, however, if an employer is motivated by union animus in its decision to close a part of its business, engaging in collective bargaining would be an exercise in futility. Even worse, employees who learn of the employer's true motivation would simply be intimidated. Therefore, the Board concludes that "requiring the employer to discuss his unlawful motives with the union would rarely be useful. . ." and that it would "not always be worthwhile to consider the applicability of Section 8(a)(5) to a plant closure in a case in which discriminatory motivation exists." (Bd. Br. at 33 *et seq.*).

The legal paradox implicit in the Board's position is immediately obvious. An employer who is willing to meet its duty to

bargain and is free of union animus will incur a more extensive bargaining obligation than an employer whose actions are redolent with union animus. Under the Board's theory, an employer would be encouraged to evince anti-union motivation in order to escape any obligation to bargain over the decision to close part of its business. Nothing in the intent of Congress nor in the *Darlington* decision contemplates such an absurd result.

In addition, the Petitioner denies the Board's assertion that *Darlington* speaks only to issues raised in connection with Section 8(a)(3) and does not address itself to the scope of mandatory bargaining under Section 8(a)(5).[9]

In *Darlington,* this Honorable Court specifically recognized that the decision to terminate an entire business is a "managerial prerogative":

> . . . A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Act. We find neither. (*Id.* at 274).

When applying this managerial prerogative in the context of a partial closing situation, this Court limited management's right to take unilateral action only in the presence of union animus which would have the effect of chilling unionism among the company's remaining employees.

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9 This position shall be more fully developed in the accompanying text of Petitioner's Reply Brief at 9-12, *supra.*

B. In the absence of union animus, there exists no distinction at law or in reason which suggests imposition of a mandatory duty to bargain over a decision to terminate operations upon an employer operating more than one facility. This conclusion is reasonably premised upon the Court's pronouncement in *Darlington* that no such duty exists in the context of an employer's "complete" business closing.

The NLRB's *per se* approach espoused in *Ozark Trailers, Inc.*[10] and its progeny, and the presumptive duty analyses recently offered by two divided federal circuit courts of appeals[11] imposing a mandatory duty to bargain in the partial closing situation is inconsistent with basic entrepreneurial premises developed by this Court in *Darlington, supra.*

The Petitioner fully and enthusiastically embraces the sound reflections of the *Darlington* Court which concluded

> . . . A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a startling innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Act. We find neither.
>
> So far as legislative manifestation is concerned, it is sufficient to say that there is not the slightest indication in the history of the Wagner Act or of the Taft-Hartley Act that Congress envisaged any such result under either statute.

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10 161 N.L.R.B. 561, 63 L.R.R.M. 1264, 67 CCH ¶20,834 (1966).

11 Only the divided decision of the court below and the Third Circuit Court of Appeals have adopted presumption analyses that a mandatory duty to bargain over a partial closing decision exists. The vast majority of the circuits have determined since this Court's decisions in *Fibreboard* and *Darlington* were announced that an employer's partial closing decision is not a mandatory subject of collective bargaining as the decision falls within the employer's "core of entrepreneurial control". *See* Pet. Br. at 29-34.

> As for judicial precedent, the Board recognizes that "(t)here is no decided case directly dispositive of Darlington's claim that it had an absolute right to close its mill, irrespective of motive." 139 N.L.R.B. at 250, 51 L.R.R.M. 378 (380 U.S. at 274).

In the case now before the Court, the employer's animus is not at issue. In fact, the case is devoid of animus and a violative motive is not a component of the record below.[12] The partial closing decision of the Petitioner was legitimatized by its business reason predication and was not tainted by union animus.

The Petitioner recognizes the soundness of *Darlington's* inhibition of an ill-willed employer's ability to chill unionism and employees' section 7 rights by undertaking a partial closing of its enterprise for that purpose. We suggest that the question presented in this case is resolvable, in part, on a sensible extension of principles announced by this Court in *Darlington,* which held that an employer is free to terminate its entire operation for any reason whatsoever including a liquidation motivated by vindictiveness towards a union, and that such action does not constitute an unfair labor practice.[13]

A question which the National Labor Relations Board has never appropriately addressed, however, concerns the paradox in treating employers who partially close and those whom completely terminate operations differentially for purposes of assessing their duty to manditorily bargain over each's closing

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12 The parties have stipulated prior to the consideration of this case by the court below that section 8(a)(3) animus was *not* at issue. The sole concern of the Second Circuit became whether First National violated section 8(a)(5) of the Act in failing to bargain over what it urged was not a mandatory bargaining subject.

13 The Fifth Circuit Court of Appeals has appropriately observed in *NLRB* v. *Southern Plasma Corp.*, ____ F.2d ____, 105 L.R.R.M. 2782, 2784 (5th Cir. 1980) that this Court made it clear in *Darlington* that an employer may shut down his entire business even if motivated by the most egregious anti-unionism without violating the labor Act.

decision. The explicit refusal of the court below to address this question[14] represents a principal failure with its analysis of the issue now under review.

If as the *Darlington* Court has suggested, a single-facility business or multi-site enterprise can cease operations for *any* reason which may be advanced, it defies logic why in the absence of union animus a multi-site employer should be constrained to be unequivocally required to bargain over its partial closing decision. Petitioner would, of course, recognize the continued inherent soundness of a statutory construction requiring "effects" bargaining in the multi-facility context.[15] The entrepreneur, however, who realizes the generally unwelcomed necessity to cease operating to forestall further economic detriment should not be saddled with a mandatory duty to bargain over its closing decision in the absence of union animus. Such a determination by this Honorable Court would be consonant with the judicial treatment afforded single-site employers and multi-site businesses that completely liquidate under principled management prerogative guidelines announced in *Darlington*.

The incidental loss of employment which results from a business closing is not a welcomed circumstance for labor or for an employer, whose economies dictate such a decision. The

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14 *See* the decision of the court below contained in Pet. App. A at 11 n.6. The court in the Petitioner's view grievously abdicated from a full and judicious consideration of the question presented when it stated:

> Since the issue is not before us, we express no opinion as to whether the distinction between a complete and partial closing recognized in Textile Workers is significant in a mandatory bargaining case. *Id.*

The submission of the Petitioner remains that a principled determination of the issue before this Court necessarily requires heightened conjunctive consideration of *Fibreboard* and *Darlington* contrary to the undertaking of the Second Circuit.

15 The Board's construction of the Act requiring "effects" bargaining is of no moment in resolving whether an employer's partial closing decision is a mandatory subject of collective bargaining.

Petitioner freely recognizes the *bargainable* nature of an employer's decision to terminate a losing portion of its operations based solely for legitimate business reasons. However, under the mandatory, permissive and illegal subject bargaining trichotomy announced by this Court in *Borg-Warner*[16], the Petitioner submits that a sound reading of *Darlington's* guidelines demarcating a business' entrepreneurial prerogatives to terminate operations absent union animus and the carefully drafted *Fibreboard* decision and concurrence of Justice Stewart reflect the *permissive*[17] and not mandatory nature of the bargaining subject presently considered.

That the partial closing decision here is permissive in nature is further supported by the notion that "Management decisions that fundamentally alter the direction of an enterprise, or

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16 *See* note 6, *supra,* and accompanying text.

17 The National Labor Relations Board in the *Ozark Trailers* progression of decisions has observably failed to discern that which most of the federal circuit courts of appeals have: while the partial closing decision is certainly a *bargainable* subject as its subject matter is not illegal, it falls within what the *Borg-Warner* Court concluded was a permissive subject of bargaining. As such, the partial closing decision is within the "core of entrepreneurial control" and is clearly not mandatory in nature. An employer need not bargain over its decision to close unless it voluntarily assents to do so since as this Court observed in *Borg-Warner* with respect to permissive subjects of bargaining, "each party is free to bargain or not to bargain, and to agree or not agree".

The Respondent and its amici suggest that the Act's legislative history and a speech made by Senator Taft authoritatively broaden to an unchecked degree the array of mandatory subjects of collective bargaining. *See* especially AFL-CIO brief at 22. They seem to urge that but a dichotomy of bargaining subjects exist: legal (mandatory) and illegal. Such an approach, we submit, does not comport with the analysis of this Court in *Borg-Warner.* It is especially significant to note that since *Borg-Warner* was decided in 1958, the Act has been amended from time to time by Congress in various respects. The trichotomy of mandatory, permissive and illegal subjects of bargaining developed by this Court and widely recognized since has not been subjected to further Congressional amendment. Thus, the vitality of the distinction between mandatory and permissive bargaining subjects still flourishes contrary to the implicit suggestion of the Respondent and its amici.

involve significant reallocation of capital generally are not considered decisions concerning terms and conditions of employment and are not mandatory subjects of bargaining." *NLRB* v. *International Harvester Co.*, 618 F.2d 85, 89 (9th Cir. 1980) relying on *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. at 223, 85 S. Ct. at 409 (Stewart, J., concurring). The Court of Appeals for the District of Columbia has similarly suggested that major shifts in the capital investment or corporate strategy of a business are not mandatory bargaining subjects, even though they may have a profound incidental effect on the conditions of employment. *Local 777, Democratic Union Organizing Committee* v. *NLRB*, 603 F.2d 862, 884, 101 L.R.R.M. 2628 (D.C. Cir. 1979).

In a recent noteworthy decision reported as *National Car Rental Systems, Inc.*, 252 N.L.R.B. No. 27, 105 L.R.R.M. 1263 (1980) the National Labor Relations Board held that an employer had not violated section 8(a)(5) of the Act by its sale of a facility and assignment of lease accounts to another company, its relocation to a nearby facility twenty miles distant, and its termination of all unit employees without providing notice to the union or an opportunity to bargain with National Car over the partial closing decision.[18] The decision reports at its outset that National Car operates a *number* of facilities throughout the United States, including *three* in Newark, New Jersey from which it leases and rents cars or trucks. Relying on *General Motors Corp., GMC Truck & Coach Division,*[19] the Board determined that National Car's decision to sell its accounts to another company and to turn over one of its Newark, New Jersey facilities based upon its

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18 The Board appropriately determined that National Car had violated section 8(a)(5) by its failure to notify the union in a timely fashion and provide it with an opportunity to bargain with respect to the *effects* of its business decision.

19 191 N.L.R.B. 951, 77 L.R.R.M. 1537 (1971), *enfd. sub nom. International Union, United Automobile Aerospace and Agricultural Implement Workers of America, UAW and its Local 864, UAW* v. *NLRB*, 470 F.2d 422, 81 L.R.R.M. 2439 (D.C. Cir. 1972).

corporate hierarchy's reasoned business judgment to relocate to a nearby Edison plant was a decision "essentially financial and managerial in nature," involving a "significant investment or withdrawal of capital" affecting the "scope and ultimate direction of an enterprise" as stated in *General Motors* and therefore did not require National Car to bargain regarding its decision.[20]

The Petitioner suggests that a doctrinal uneasiness has been articulated by the Board in *National Car* with respect to the mandatory duty to bargain over partial closing decisions established by the Board in 1966 in *Ozark Trailers, supra.* The decision shows that National Car had outlets throughout the country and had two others in Newark when it sold the subject facility in favor of a move to nearby Edison. The employer principally based its decision to close not upon any grand design to fundamentally alter the nature of its dispersed enterprise or to significantly reallocate its capital generally. The Board's decision reports instead that the employer had found the Newark site less than satisfactory. The entrance to the garage was too small and required larger trucks' air deflectors to be dismantled in order to allow their entry into the garage. In addition, the fuel pumps were inconveniently located. The employer sought a replacement or satellite facility for some time before it finally effected the sale of its facility.[21] Such commonplace managerial concerns require, we would submit, a reversal of the decision below to remove an unreasonable and unworkable inhibition imposed upon effective business judgments which come within the core of an employer's managerial prerogatives.

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20 252 N.L.R.B. No. 27, 105 L.R.R.M. 1263, 1268 (1980).

21 *Id.* at 1265.

III.

THE STATISTICS OFFERED BY THE BOARD AND ITS AMICI TO SUPPORT THE CONTENTION THAT INDUSTRIAL EXPERIENCE ILLUSTRATES THE PROPRIETY OF EXTENDING THE SCOPE OF MANDATORY BARGAINING TO DECISIONS TO CLOSE PART OF A PLANT ARE NOT PROBATIVE

In *Fibreboard*, this Honorable Court considered the realities of industrial experience in gauging whether collective bargaining was a useful problem-solving technique in particular kinds of disputes. (*Fibreboard*, *supra,* at 211). Therefore, in its main brief, the Petitioner cited studies conducted by the United States government to demonstrate that provisions restricting an employer's right to discontinue a portion of its business were contained in only a statistically insignificant percentage of collective bargaining agreements. (Pet. Br. at 20-24).

The Board and the Amici who support its position have devoted a great deal of attention to surveys, academic publications and media pieces which purport to illustrate the propriety of requiring negotiations over a managerial decision to close part of a business. The Petitioner respectfully submits that the material so offered is, at best, not probative.

First, the vast bulk of material cited by the Board and its amici fails to make the crucial distinction between "decision" and "effects" bargaining. This Petitioner has never taken the position that it should be exempted from the legal requirement of bargaining over the effects of its managerial decisions on the work force. Such bargaining, as the Board points out in its brief, can ameliorate the psychological and financial consequences of a decision to close, and can pave the way for the smooth execution of management's plan. (Bd. Br. at 21-24). The Board and its supporting amici, have, however, totally failed to show how "decision" bargaining achieves these mutually desirable objectives better than "effects" bargaining.

Without such a showing and without statistics that discriminate between the two types of negotiations, the material submitted is meaningless and offers no aid in resolving the issues at hand.

Second, much of the material submitted in opposition to the Petitioner only shows that, on occasion, unions have surrendered economic and work rule concessions in order to preserve the jobs of bargaining unit members employed by ailing companies. This information does not bear on the case at bar. The Respondent has failed to show that concessions by unions have been made in response to managerial proposals to close portions of business enterprises. Without this requisite specificity, the material on industrial experience is offered out of context and loses all relevance. This Honorable Court and the Petitioner are left to speculate concerning the frequency and efficacy of "decision" bargaining in partial closing situations.

Finally, it must be noted in passing that, even if Respondent could document instances in which negotiations took place over the decision to close part of a business, such information could not be accepted as a genuine indication of industrial experience. For many years, the issues of decision bargaining and partial closings have been mired in legal controversy. Under these circumstances, many responsible employers have engaged in "decision bargaining" in order to comply with their perception of the law and not because they really believe that the bargaining process could produce results of sufficient weight to effect the contemplated managerial decision. Therefore, the proffered data is "tainted" and carries little, if any, probative force in the consideration of this case.

CONCLUSION

The judgment of the Court of Appeals for the Second Circuit in the instant matter should be reversed and the order of the National Labor Relations Board should be denied enforcement.

Respectfully submitted,

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